STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERNEST F. & RUTH A. BEHR	:	DETERMINATION DTA NO. 815449
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1985 and 1986.	:	

Petitioners, Ernest F. and Ruth A. Behr, 462-1661 Old Country Road, Riverhead, New York 11901, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1985 and 1986.

The Division of Taxation, by its representative Steven U. Teitelbaum, Esq. (Peter T. Gumaer, Esq., of counsel), brought a motion dated February 11, 1998 for an order of summary determination in the above-referenced matter. Petitioners, appearing *pro se,* did not respond to the motion. Petitioners' response was due on March 16, 1998, which date commenced the 90-day period for issuance of this determination. Upon review of all papers filed in connection with this motion, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of tax paid on Federal pension income as untimely pursuant to Tax Law § 687(a).

FINDINGS OF FACT

1. On March 8, 1995, petitioners filed amended personal income tax returns claiming a refund of taxes paid on Federal pension income for the years 1985 and 1986. On July 31, 1995, the Division of Taxation ("Division") issued a Notice of Disallowance to petitioners denying their claim for refund on the basis that such claim had not been filed within three years of the filing of petitioners' tax returns for the years at issue.

2. Petitioners challenged the Division's Notice of Disallowance by requesting a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS issued a Conciliation Order (CMS No. 150096) dated July 26, 1996 denying petitioners' request and sustaining the Notice of Disallowance.

3. On October 15, 1996, petitioners filed a petition which challenged the Division's denial of their refund claim for the years 1985 and 1986.

4. The Division served an answer to the petition on January 8, 1997. The Division denied the allegations contained in the petition and affirmatively stated that petitioner was a Federal employee (it is not clear from the record whether it was Mr. or Mrs. Behr) who paid tax on Federal pension income for the years 1985 and 1986, that petitioners' claim for refund for such years was denied as untimely, and that any instances where refunds were approved for those who paid New York State income tax on Federal pension income were limited to instances where timely refund claims had been filed.

5. The Division's motion for summary determination is supported by the affirmation of Peter T. Gumaer, sworn to February 9, 1998, and the affidavit of Charles Bellamy, sworn to February 9, 1998.

Mr. Bellamy is employed by the Division as a Tax Technician II in its Audit Division. His responsibilities include reviewing and processing refund claims filed by taxpayers who paid tax on Federal pension income. Mr. Bellamy, in his affidavit, attests that petitioners: 1) timely filed their 1985 and 1986 personal income tax returns (i.e., filed their returns for such years on or before April 15, 1986 and 1987, respectively); 2) filed amended personal income tax returns claiming refunds for taxes paid on Federal pension income for the years 1985 and 1986 on March 8, 1995; and 3) failed to file any claims for refund or amended returns for the years 1985 and 1986 at any time prior to March 8, 1995.

Mr. Gumaer, in his affirmation, asserts that since petitioners did not file refund claims or amended returns for their personal income taxes for the years 1985 and 1986 within three years from the time the returns were filed or two years from the time taxes were paid, whichever is later, pursuant to Tax Law § 687, petitioners' refund claim should be barred as untimely, the petition before the Division of Tax Appeals should be denied with prejudice and the motion for summary determination should be granted.

CONCLUSIONS OF LAW

A. To prevail on a motion for summary determination the moving party must show that there are no issues regarding the material facts, and that the facts presented compel a determination in his or her favor (20 NYCRR 3000.9[b]). In this particular case, petitioners have raised no challenge to the facts alleged by the Division, including the central fact that petitioners did not file timely claims for refund for the years in issue. Accordingly, the facts as set forth by the Division in its moving papers are deemed admitted (***see***, ***Kuehne & Nagel v. Baiden***, 36 NY2d 539, 544, 369 NYS2d 667). Therefore, with no material facts at issue, the question becomes whether the Division is entitled to summary determination on the law, to wit, whether

petitioners' claim for refund for the years 1985 and 1986 was properly denied as untimely filed pursuant to Tax Law § 687.

B. As noted, the central fact set forth in the affidavit of Charles Bellamy, and deemed admitted by petitioners, is that petitioners did not file a timely claim for refund for the years 1985 and 1986. On March 28, 1989, the United States Supreme Court issued a decision in the case of ***Davis v. Michigan Dept. Of Treasury*** (489 US 803, 103 L Ed 2d 891). The ***Davis*** decision held that a state violates the constitutional doctrine of intergovernmental tax immunity when the state taxes retirement benefits paid by the Federal government but exempts from taxation retirement benefits paid by the state or its political subdivisions. The ***Davis*** decision did not address the issue of the retroactive application of its holding.

At the time of the ***Davis*** decision, New York Tax Law § 612(c)(former [3]) exempted State and local pensions from taxation; however there was no similar provision for Federal pensions. As a result of ***Davis***, the New York State Legislature amended the Tax Law effective January 1, 1989, to exclude Federal pensions from New York income tax (***see***, L 1989, ch 664; Tax Law § 612[c][3][ii]). This exemption was to apply beginning with tax year 1989. At that time, the Division also took the position that the ***Davis*** decision applied prospectively only and denied all claims for refund of tax paid on Federal pensions for years prior to 1989 even where timely claims were filed. Litigation on the issue of whether the ***Davis*** holding should be applied retroactively ensued in New York and throughout the country (***see***, ***Duffy v. Wetzler***, 148 Misc 2d 459, 555 NYS2d 543, ***mod*** 174 AD2d 253, 579 NYS2d 684, ***appeal dismissed*** 80 NY2d 890; 587 NYS2d 900, ***revd*** 509 US 917, 125 L Ed 2d 716, ***on remand*** 207 AD2d 375, 616 NYS2d 48, ***lv denied*** 84 NY2d 838, 617 NYS2d 129, ***cert denied*** 513 US 1103, 130 L Ed 2d 673).

C. Subsequent to the ***Duffy v. Wetzler*** decision, the issue of how to apply the ***Davis*** holding was resolved in ***Harper v. Virginia Dept. Of Taxation*** (509 US 86, 125 L Ed 2d 74). The Supreme Court in ***Harper*** held that the rule announced in ***Davis*** was to be given full retroactive effect; however, it did not provide relief to the petitioners therein. Rather, citing to ***McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*** (496 US 18, 100 L Ed 2d 17), the Supreme Court held that a state is free to choose the form of remedy it would provide to rectify any unconstitutional deprivation, but that such a remedy must satisfy the demands of Federal due process (***Harper v. Virginia Dept. Of Taxation***, ***supra*** at 101, 125 L Ed 2d at 88-89). In this context, Federal due process requires that where taxes are paid pursuant to a scheme ultimately found unconstitutional, the state must provide taxpayers with "meaningful retrospective relief" from taxes, meaning that in refund actions the state must afford taxpayers a "fair" opportunity to challenge the accuracy and legal validity of the tax and a "clear and certain remedy" for any erroneous or unlawful tax collection (***see***, ***McKesson Corp. v. Division of Alcoholic Beverages and Tobacco***, ***supra*** *at 39, 110 L Ed 2d at 37-38).*

D. Following the Supreme Court decision in ***Harper v. Virginia Dept. Of Taxation*** (***supra***), the State of New York, in June 1994, decided to pay full refunds plus interest to the approximately 10,000 Federal retirees who paid State income taxes on their Federal pensions prior to 1989 pursuant to tax provisions that were later determined to be unconstitutional in ***Davis v. Michigan Dept. Of Treasury*** (***supra***), and who had filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance (***Duffy v. Wetzler***, 207 AD2d 375, 616 NYS2d 48, ***supra***). Thus, in response to the ***Davis*** and ***Harper*** decisions, the State amended the statute to conform to the rulings and granted refunds to those Federal retirees who had filed timely refund claims.

E. Tax Law § 687(a) controls refunds of overpayments of income tax in New York and provides, in pertinent part, as follows:

> Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid.

F. Petitioners do not dispute that their refund claim for the years at issue was not filed until March 8, 1995. Rather, they assert that their petition should not be denied based on a technicality. They argue that they were unaware of a time limitation for filing a refund claim. They also contend that the Division did not supply information and forms to them in a timely fashion. The issue is thus whether the Tax Law § 687 statute of limitations may be enforced where the statute imposing the tax is later found to be unconstitutional. The Supreme Court held in ***McKesson*** that a relatively short statute of limitations is sufficient for due process requirements, citing the example of a Florida refund statute which imposes a three-year statute of limitations (***McKesson Corp. v. Division of Alcoholic Beverages and Tobacco***, ***supra*** at 24, 110 L Ed 2d at 28, note 4, ***citing*** Fla Stat § 215.26[2]; ***City of Miami v. Florida Retail Federation, Inc.***, 423 So 2d 991, 993). Clearly, New York's three-year statute of limitations meets the Supreme Court's due process requirements as set forth in ***McKesson***. (***See, Matter of Burkhardt***, Tax Appeals Tribunal, January 9, 1997; ***Matter of Jones***, Tax Appeals Tribunal, January 9, 1997; ***Matter of Silverman***, Tax Appeals Tribunal, January 9, 1997.) Accordingly, petitioners' contention that the relevant limitations period should not be applied is rejected.

G. Petitioners did not file any refund claims for the years at issue within the three-year limitations period. Rather, their refund claim for tax years 1985 and 1986 was filed on March 8, 1995, after the statute of limitations for the years in issue had expired. The Tax Appeals

Tribunal has consistently held, in every case brought before it to date by Federal retirees, that refunds cannot be granted unless a timely claim has been filed (***see***, ***Matter of Epstein***, Tax Appeals Tribunal, March 27, 1997; ***Matter of Hinds***, Tax Appeals Tribunal, February 13, 1997). Furthermore, petitioners' contention that the Division should have notified them that they were entitled to a refund of taxes paid on Federal pension income reported on their returns is without merit. The Division does not have an affirmative obligation to help taxpayers preserve their claims by notifying them of due dates for the filing of pertinent forms. It was petitioners' responsibility to ascertain from the Division how to go about filing a refund claim. They failed to do so. Moreover, petitioners provided no evidence that they were misled by any Division employees. There being no material facts at issue and the Division being entitled to summary determination on the law, petitioners' claim for refund of personal income tax for the years 1985 and 1986 is barred and was properly denied as untimely filed pursuant to Tax Law § 687.

H. The Division's Motion for Summary Determination is granted, the petition of Ernest F. and Ruth A. Behr is denied, and the Division's Notice of Disallowance of petitioners' refund claim for the years 1985 and 1986 is sustained.

DATED: Troy, New York
April 23, 1998

/s/ *Thomas C. Sacca*
ADMINISTRATIVE LAW JUDGE